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C. Because projections constitute opinions within the meaning of the Rule, they must come within paragraph (b)(3).

[49 FR 37573, Sept. 25, 1984, as amended at 59 FR 21650, Apr. 26, 1994; 60 FR 6966, Feb. 6, 1995]

§ 230.140 Definition of “distribution” in section 2(11) for certain transactions.

A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(11) of the Act.

[24 FR 6386, Aug. 8, 1959]

§ 230.141 Definition of “commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commissions” in section 2(11), for certain transactions.

(a) The term *commission* in section 2(11) of the Act shall include such remuneration, commonly known as a spread, as may be received by a distributor or dealer as a consequence of reselling securities bought from an underwriter or dealer at a price below the offering price of such securities, where such resales afford the distributor or dealer a margin of profit not in excess of what is usual and customary in such transactions.

(b) The term *commission from an underwriter or dealer* in section 2(11) of the Act shall include commissions paid by an underwriter or dealer directly or indirectly controlling or controlled by, or under direct or indirect common control with the issuer.

(c) The term *usual and customary distributors’ or sellers’ commission* in section 2(11) of the Act shall mean a commission or remuneration, commonly known as a spread, paid to or received by any person selling securities either for his own account or for the account

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of others, which is not in excess of the amount usual and customary in the distribution and sale of issues of similar type and size; and not in excess of the amount allowed to other persons, if any, for comparable service in the distribution of the particular issue; but such term shall not include amounts paid to any person whose function is the management of the distribution of all or a substantial part of the particular issue, or who performs the functions normally performed by an underwriter or underwriting syndicate.

[2 FR 1075, May 26, 1937]

§ 230.142 Definition of “participates” and “participation,” as used in section 2(11), in relation to certain transactions.

(a) The terms *participates* and *participation* in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) shall not include the interest of a person (1) who is not in privity of contract with the issuer nor directly or indirectly controlling, controlled by, or under common control with, the issuer, and (2) who has no association with any principal underwriter of the securities being distributed, and (3) whose function in the distribution is confined to an undertaking to purchase all or some specified proportion of the securities remaining unsold after the lapse of some specified period of time, and (4) who purchases such securities for investment and not with a view to distribution.

(b) As used in this section:

(1) The term *issuer* shall have the meaning defined in section 2(4) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) and in the last sentence of section 2(11).

(2) The term *association* shall include a relationship between two persons under which one:

(i) Is directly or indirectly controlling, controlled by, or under common control with, the other, or

(ii) Has, in common with the other, one or more partners, officers, directors, trustees, branch managers, or other persons occupying a similar status or performing similar functions, or

(iii) Has a participation, direct or indirect, in the profits of the other, or

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has a financial stake, by debtor-creditor relationship, stock ownership, contract or otherwise, in the income or business of the other.

(3) The term *principal underwriter* shall have the meaning defined in § 230.405.

[3 FR 3015, Dec. 16, 1938]

CROSS REFERENCE: For interpretative release applicable to § 230.142, see No. 1862 in tabulation, part 231, of this chapter.

§ 230.143 Definition of “has purchased”, “sells for”, “participates”, and “participation”, as used in section 2(11), in relation to certain transactions of foreign governments for war purposes.

The terms *has purchased*, *sells for*, *participates*, and *participation*, in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b), shall not be deemed to apply to any action of a foreign government in acquiring, for war purposes and by or in anticipation of the exercise of war powers, from any person subject to its jurisdiction securities of a person organized under the laws of the United States or any State or Territory, or in disposing of such securities with a view to their distribution by underwriters in the United States, notwithstanding the fact that the price to be paid to such foreign government upon the disposition of such securities by it may be measured by or may be in direct or indirect relation to such price as may be realized by the underwriters.

[6 FR 2052, Apr. 23, 1941]

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

PRELIMINARY NOTE: Rule 144 is designed to implement the fundamental purposes of the Act, as expressed in its preamble, *To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof* * * * The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning the issuer is available to the public, the rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by per-

sons who have acquired restricted securities of the issuer.

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any nonexempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.

2. In addition to the exemptions found in section 3, four exemptions applicable to transactions in securities are contained in section 4. Three of these section 4 exemptions are clearly not available to anyone acting as an *underwriter* of securities. (The fourth, found in section 4(4), is available only to those who act as brokers under certain limited circumstances.) An understanding of the term *underwriter* is therefore important to anyone who wishes to determine whether or not an exemption from registration is available for his sale of securities.

The term *underwriter* is broadly defined in section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition has traditionally focused on the words *with a view to* in the phrase *purchased from an issuer with a view to* * * * *distribution*. Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an *underwriter* under that section. Individual investors who are not professionals in the securities business may also be *underwriters* within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Since it is difficult to ascertain the mental state of the purchaser at the time of his acquisition, subsequent acts and circumstances have been considered to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

It should be noted that the statutory language of section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer